1114-196

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 245.

ROGER M. SHERMAN, PLAINTIFF IN ERROR,

vs.

IRVING GRINNELL AND GEORGE S. BOWDOIN, EXECUTORS OF MOSES H. GRINNELL, DECEASED.

IN ERROR TO THE CITY COURT OF NEW YORK.

FILED OCTOBER 15, 1888.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the city court of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said city court of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, plaintiffs, and Roger M. Sherman, defendant, wherein was drawn in question the validity of certain statutes of and an authority exercised under the United States and the decision is against their validity, and wherein was drawn in question and specially claimed on the part of the plaintiff in error, said defendant, certain rights, privileges, and immunity under the Constitution and certain statutes of the United States and under certain authority exercised under the United States and the decision is against the right, privileges, and immunity specially set up and claimed, a manifest error hath happened, to the great damage of the said Roger M. Sherman, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,
b with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record of proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the Supreme Court of the United States, this 10th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

This writ is allowed.
May 9th, 1888.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

STATE, COUNTY, AND CITY OF NEW YORK, *ss:*

I, Michael T. Daly, clerk of the city court of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 48, inclusive, contain a true transcript of the records and proceedings had in said court in the case of Irving Grinnell and George S. Bowdoin, as executors, defendants in error, against Roger M. Sherman, plaintiff in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of New York this 11th day of May, 1888.

[Seal City Court of New York.]

MICHAEL T. DALY,
Clerk of the City Court of New York.

c [Endorsed:] U. S. Supreme Court. Roger M. Sherman, pl'ff in error, *vs.* Irving Grinnell and George S. Bowdoin, def'ts in error. Writ of error to city court of New York. Roger M. Sherman, pl'ff in error, 140 Nassau St., New York, N. Y.

1 Court of Common Pleas for the City and County of New York.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Pleas in the court of common pleas for the city and county of New York held at the court-house, in the city of New York, on the 10 day of March, in the year of our Lord one thousand eight hundred and eighty-seven, before the judges of said court.

Witness Hon. R. L. Larremore, C. J.; Hon. Joseph F. Daly, J.; Hon. George M. Van Hoesen, J.

Remittitur, March 22, 1887.

2 IRVING GRINNELL and GEORGE S. BOWDOIN, Ex., }
against
ROGER M. SHERMAN. }

Be it remembered that on the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-seven, Roger M. Sherman, the appellant in this action, came here into the court of common pleas for the city and county of New York, by Charles C. Marble, his attorney, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the city court of the city of New York; and Irving Grinnell *et al.*, the respondents in said action, afterwards appeared in said court of common pleas, by Evarts, Choate, and Beaman, their attorneys.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

3 Whereupon that said court of common pleas, having heard this cause argued by Mr. Edwin B. Smith, of counsel for the appellant, and Mr. Treadwell Cleveland, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the city court of the city of New York be affirmed with costs.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said city court, there to be proceeded upon according to law.

4 Therefore it is considered that the said judgment is affirmed with costs.

And hereupon as well the notice of appeal and return thereto aforesaid as the judgment of the court of common pleas aforesaid by them given in the premises are by the said court of common pleas remitted unto the city court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said city court, before the justices thereof, &c.

NATH'L JARVIS, JR.,
Clerk of the Court of Common Pleas,
City and County of New York.

Court of Common Pleas, Clerk's Office.

NEW YORK, *March* 22, 1887.

[L. S.] I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of common pleas, with the papers originally filed therein attached thereto.

NATH'L JARVIS, JR., *Clerk.*

5 At a general term of the court of common pleas for the city and county of New York held in the county courthouse, in the city of New York, on the 10 day of March, 1887.

Present: Hon. Richard L. Larremore, chief justice; Hon. Joseph F. Daly, Hon. George M. Van Hoesen, justices.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Respondents,

against

ROGER M. SHERMAN, Appellant.

Roger M. Sherman, the defendant in the above-entitled action, having appealed to the general term of this court from the judgment of the general term of the city court of New York, bearing date February 1, 1887, and heretofore entered in said action on the 2nd day of February, 1887, in the office of the clerk of the city court of New York, and affirming a judgment of said city court in favor of said plaintiffs and against said defendant for the sum of twenty-one hundred and fifteen dollars and thirty-five cents, entered in the office of the clerk of said court on the 23d day of November, 1886,

and said appeal having come on to be heard in its order on the calendar, after hearing Mr. Edwin B. Smith, of counsel, in support of said appeal, and the court not calling upon Mr. Treadwell Cleveland, of counsel for respondents, and due deliberation having
6 been thereupon had, now, on motion of Evarts, Choate and Beaman, attorneys for the said plaintiffs and respondents, it is—

Ordered that said judgment so appealed from as aforesaid be, and the same is hereby, in all things affirmed with costs; and it is further—

Ordered that this order and the judgment to be entered herein in accordance herewith be remitted to the court below, to be enforced according to law.

A copy.

NATH'L JARVIS, *Clerk.*

7 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, Plaintiffs,
against
ROGER M. SHERMAN, Defendant.

Messrs. Evarts, Choate and Beaman, plaintiffs' attorneys; John Reid, clerk city court of New York.

GENTLEMEN: The defendant hereby appeals to the general term of this court from the judgment entered herein on November 23 and docketed on the 24th day of November, 1886, and from each and every part thereof.

Dated November 29, 1886.

CHARLES C. MARBLE,
Defendant's Attorney, 59 Pine Street,
Room 4, 5th Floor, New York City.

8 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Plaintiffs,
against
ROGER M. SHERMAN, Defendant.
} Summons.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney, within six days after the service of this summons, exclusive of the day of service: and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 26th, 1885.

EVARTS, CHOATE & BEAMAN,
Plaintiffs' Attorneys.

Post-office address, 52 Wall street; office, No. 52 Wall street, New York city.

9 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased,
against
ROGER M. SHERMAN.

Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, the plaintiffs in this action, by Evarts, Choate & Beaman, their attorneys, complain of Roger M. Sherman, the defendant herein, and thereupon the said plaintiffs state upon information and belief:

First. That heretofore and on or about the twenty-fourth day of November, 1877, the said Moses H. Grinnell departed this life at the city of New York, leaving a last will and testament, which was afterwards and on the first day of December, 1877, duly admitted to probate by the surrogate of the county of New York, to whom jurisdiction in that behalf appertained, and letters testamentary thereupon were upon the day and date last above mentioned issued by the said surrogate to the plaintiffs, as executors of the said last will and testament, and that such letters testamentary so issued have ever since continued and now continue in full force and effect.

Second. That the said Moses H. Grinnell, deceased, was collector of customs for the district of the city of New York for a term beginning on or about the first day of April, 1869, and ending on or about the twentieth day of July, 1870; that during the said
10 term Theodore H. Vetterlein and Bernard T. Vetterlein, doing business together in New York city as a copartnership under the firm name and style of T. H. Vetterlein & Sons, incurred certain fines, penalties, and forfeitures for breaches of the laws relating to the customs, committed within the district aforesaid; that thereafter and on or about the seventh day of February, 1871, under and pursuant to an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, 1867, the said T. H. Vetterlein and B. T. Vetterlein, composing the firm of T. H. Vetterlein & Sons, were duly adjudged bankrupts by the judge of the district court for the southern district of New York on the petition of certain of their creditors duly filed on the twenty-eighth day of September, 1870; that subsequently and on or about the twenty-second day of June, 1872, a reference was ordered by the judge of the said district court to the register in bankruptcy to determine the validity and amount of the claim of the United States against the said T. H. Vetterlein and B. T. Vetterlein arising out of the breaches of the laws relating to the customs as above stated; that upon the proceedings before the said register the judge of the said district court, on the eighteenth day of August, 1874, rendered his decision allowing the United States to make proof of debt against the estate of the said T. H. Vetterlein and B. T. Vetterlein jointly for $99,951.25, and that the decision of the said district judge was on the seventh day of July, 1875, affirmed with costs on appeal by the circuit court for the southern district of New York, in the second circuit.

Third. That thereafter and on or about the ninth day of May, 1885, $21,347.40, proceeds of the fines, penalties, and forfeitures above mentioned, were paid by the assignee in bankruptcy of T. H. Vetterlein and B. T. Vetterlein into the Treasury of the
11 United States. Thereafter the Secretary of the Treasury of the United States, for the time being duly authorized thereto by an act of Congress entitled "An act to regulate the collection of duties on imports and tonnage," approved March second, 1799, and its various amendments and extensions, directed that $1,778.95, being one-twelfth part of the said proceeds, should be paid to the said Moses H. Grinnell.

Fourth. That heretofore and on or about the tenth day of April, 1883, the plaintiffs herein, by an instrument in writing, duly executed and delivered to the defendant herein, did make, constitute, and appoint him their true and lawful attorney in their name, place, and stead to recover from the United States of America any interest and right in the proceeds of the fines, penalties, and forfeitures incurred by the said T. H. Vetterlein and B. T. Vetterlein, as above stated, belonging to the said Moses H. Grinnell and his estate, by virtue of the act of Congress last above mentioned; that the defendant accepted the said instrument in writing and such appointment as attorney, and thereupon became the attorney for the plaintiffs as aforesaid.

Fifth. That afterwards and on or about the ninth day of May, 1885, the defendant was engaged in the performance of the functions of attorney for the plaintiffs as aforesaid; that while so engaged, and in his capacity as attorney for the plaintiffs, he received from the Treasury of the United States the sum of $1,778.95, being the same sum mentioned at the end of paragraph third of this complaint; that the defendant thereupon became accountable to the plaintiffs for the said sum of money so received and bound to pay the same to the plaintiffs without unnecessary delay; that the defendant did not so pay the same nor did he offer to pay the same to plaintiffs; that on the first day of June, 1885, the
12 plaintiffs duly requested the defendant to pay the same to them, but that the defendant wrongfully refused to pay the same as requested, and has not paid the same nor any part thereof, but has wrongfully misapplied the same to his own use.

Wherefore the plaintiffs demand judgment against the defendant for $1,778.95, with interest thereon from the ninth day of May, 1885, together with the costs of this action.

EVARTS, CHOATE & BEAMAN,
Pl'ffs' Att'ys, 52 Wall Street, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

George S. Bowdoin, being duly sworn, deposes and says that he is one of the plaintiffs above named; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

G. S. BOWDOIN.

Sworn to before me this 27th day of Oct., 1885.

WALTER B. HOWE,

[L. S.] *Notary Public, Kings Co.*

Certificate filed in New York Co.

13 City Court of New York.

IRVING GRINNELL, GEORGE S. BOWDOIN, Plaintiffs,
vs.
ROGER M. SHERMAN, Defendant.

The defendant, by his answer, upon information and belief—

I. Admits the allegations contained in the paragraphs of the complaint numbered first, second, and fourth, except that he denies that any forfeitures of property were claimed by the United States or allowed or recovered in the said bankruptcy proceedings, but only certain penalties against the person.

II. Denies the allegations contained in the paragraphs of the complaint numbered third and fifth.

III. For a separate defense the defendant further alleges, upon information and belief—

That all and any interest and right in the proceeds of fines, penalties, and forfeitures incurred by said Theodore H. Vetterlein and Bernard T. Vetterlein, belonging to the said Moses H. Grinnell or his estate by virtue of the act of Congress of March 2, 1799, and its various amendments, or by any other provision of law, on the 10th day of April, 1883, or thereafter, was and is only in such proceeds of forfeitures as were incurred by said Vetterleins in respect of property seized, and in respect of which no proceeds have been as yet realized by the United States or have come into defendant's hands; and that by force of the act of Congress of June 22, 1874, no

14 interest or right in the proceeds of any such fines or penalties belonged to him or his estate.

That besides the penalties claimed by the United States, as stated in the second paragraph of the complaint in bankruptcy proceedings, the said Vetterleins had incurred on or about October 6, 1869, a forfeiture, which was no part of and was not recovered in said bankruptcy proceedings, of 518 bales of tobacco imported by the ship "Isola," which tobacco was on that day seized for forfeiture and proceedings *in rem* instituted for the condemnation thereof in the district court of the United States for the eastern district of New York and reported to the Secretary of the Treasury.

Upon the recovery of the said sum, $21,328, for penalties in the said bankruptcy proceedings (erroneously stated in paragraph third of the complaint as $21,347.40), by an error and mistake in the Treasury Department, said sum was erroneously credited to the account of said seizure and reported as proceeds of a forfeiture, to be distributed under the provisions of an act of Congress approved March 2, 1867.

Under the provisions of the act of June 22, 1874, it was the duty of the Secretary of the Treasury to cover said penalties into the

Treasury of the United States and to make no award on account thereof to said Moses H. Grinnell or his estate; but being misled by the error and mistake aforesaid, and in the erroneous belief that the sum aforesaid was the proceeds of a seizure and forfeiture, and that the said Moses H. Grinnell had an interest therein as such proceeds by force of the act of March 2, 1867, which was not affected by the act of June 22, 1874, the Secretary of the Treasury, without authority of law, on or about May 9, 1885, directed the payment to the executors of said Moses H. Grinnell of said sum of $1,778.95, as one-twelfth of said recovery, out of the Treasury of the United
15 States, and the same was paid accordingly to the defendant as their attorney in law and fact.

Immediately thereafter and on or about June 22, 1885, the Secretary of the Treasury opened the whole question of the award in the Vetterlein case and caused defendant to be notified thereof, and referred the same to the Court of Claims.

That by reason of the premises the defendant has notice and the fact is that the said sum of $1,778.95 is the property of the United States and has been paid from the Treasury of the United States without any authority of law, and that the same is not the property of the plaintiff, and that they have no right, title, or interest in the same, and that the defendant is liable to an action by the United States to recover the same.

IV. The defendant therefore demands judgment that the complaint be dismissed and for the costs of this action.

CHARLES C. MARBLE,
Def't's Att'y, 234 Broadway, New York.

COUNTY OF NEW YORK, *ss:*

Roger M. Sherman, being duly sworn, deposes and says that he is defendant in this action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ROGER M. SHERMAN.

Sworn before me this 1st day of March, 1886.

WM. H. BLAIM,
Notary Public, N. Y. Co.

16 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN
v.
ROGER M. SHERMAN.

Proposed Findings of Fact.

First. On November, 1877, Moses H. Grinnell died at the city of New York leaving a last will and testament, which was afterwards and on December 1st, 1877, duly admitted to probate by the surro-

gate of the county of New York to whom juri-diction in that behalf appertained and letters testamentary thereupon were on the day and date last above mentioned issued by the said surrogate to the plaintiffs herein as executors of the said last will and testament.

Such letters have ever since continued and do now continue in full force and effect.

Found. C. J. N.

Second. The said Moses H. Grinnell was collector of customs for the district of the city of New York for a term beginning April 1, 1869, and ending July 20, 1870. During said term T. H. Vetterlein and B. T. Vetterlein, doing business together in New York city as copartners under the firm name and style of T. H. Vetterlein and Sons, incurred certain fines and penalties for breaches of the law relating to the customs committed in the district aforesaid. Thereafter and on or about January 7, 1871, the said T. H. Vetterlein and Sons were duly adjudged bankrupts, and thereafter in such bankruptcy proceedings the United States proved a debt against such bankrupts for $99,951.25, and the decision of the judge
17 allowing such debt was afterwards affirmed by the circuit court of the United States for the southern district of New York on July 7, 1875.

Found. C. J. N.

Third. Prior to May 2, 1885, $21,347.40, proceeds of the fines and penalties above mentioned, were paid by the assignee in bankruptcy of the said T. H. Vetterlein and Sons into the Treasury of the United States. Thereafter the Secretary of the Treasury of the United States duly directed that $1,778.95, being one-twelfth part of the said proceeds, should be paid to the said Moses H. Grinnell.

Found. C. J. N.

Fourth. On April 10, 1883, the plaintiffs herein made the defendant herein their lawful attorney to collect from the United States of America any interest in such fines and penalties belonging to the said Moses H. Grinnell, and the defendant thereupon accepted such appointment.

Found. C. J. N.

Fifth. On or about May 9, 1885, the defendant, as such attorney, received from the Treasurer of the United States the sum of $1,778.95.

Found. C. J. N.

Sixth. On June 1, 1885, the plaintiffs duly demanded payment by the defendant to them of the said sum less the compensation due to the defendant for the collection thereof, but the defendant refused to pay such sum, and has not paid the same or any part thereof.

Found. C. J. N.

Conclusion of Law.

On June 1, 1885, the defendant converted to his own use
18 the sum of $1,778.95 belonging to the plaintiff-, and is now indebted to them therefor, with interest thereon from May 9, 1885.

Judgment is ordered accordingly.

CHARLES J. NEHRBAS, *Justice.*

N. Y. City Court.

IRVING GRINNELL
against
ROGER M. SHERMAN. } Trial Term, October, 1886.

Trial before the court without a jury.
Evarts, Choate & Beaman, for plaintiffs.
Roger M. Sherman, defendant in person.

NEHRBAS, *J.:*

I have carefully examined the defendant's brief and the cases and statutes to which he refers. I cannot, however, understand how these have any bearing upon this action. The defendant received the moneys sued for, as the attorney for the plaintiff's testator, and he must, in my judgment, pay them over, notwithstanding the re-opening of the Vetterlein claim by the Secretary of the Treasury. He is estopped from denying his client's title after having collected the money for him (Waldron *v.* Baker, 4 E. D. S., 440).

The question of my refusal to postpone the trial was, I think, properly disposed of. The defendant had one adjournment, sufficient to bring on his witnesses, and even if he had offered his testimony, such as it is, intimated by the defendant's affidavit on the motion to postpone the trial, it would scarcely have strengthened his case.

19 Judgment is granted to plaintiff for $1,778.95, with interest, costs, and extra allowance of 5 per cent., 10 days' stay of execution after notice of entry of judgment, and 30 days to make a case.

City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased,
against
ROGER M. SHERMAN. } Judgment, November, 1886.

The issues in the above-entitled action having been brought on for trial, before Mr. Justice Nehrbas, at a trial term of this court, held at the city hall, in the city of New York, on the 13th day of October, 1886, a jury having been duly waived by consent of parties in open court; and the said justice having heard and considered

the proofs and arguments of the respective parties and the decision of the court stating separately the facts found, and the conclusions of law having been rendered, and the court having ordered judgment in writing in favor of the said plaintiffs against the said defendant for the sum of one thousand seven hundred and seventy-eight dollars and ninety-five cents, with interest thereon from the 9th day of May, 1885, and their costs, including an extra allowance: Now, therefore, in pursuance of said decision and on motion of Evarts, Choate & Beaman, attorneys for the plaintiffs herein, it is—

Adjudged that Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, the said plaintiffs, recover from and against Roger M. Sher-
20 man, the said defendant, the sum of one thousand seven hundred and seventy-eight dollars and ninety-five cents, together with interest thereon from the 9th day of May, 1885, amounting to one hundred and sixty-four dollars and twenty-five cents, and their costs, taxed at the sum of one hundred and seventy-two dollars and fifteen cents, amounting in all to the sum of twenty-one hundred and fifteen dollars and thirty-five cents, and that the said plaintiffs have execution against the said defendant therefor.

City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors,
against
ROGER M. SHERMAN.

Case and Exceptions.

This case came on for trial before Mr. Justice Nehrbas, at a trial term, on the 13th day of October, 1886, and, a jury being duly waived, the issues were tried by the court.

Thereupon, to maintain the issues on their part, plaintiffs offered in evidence a paper certified under the seal of the Treasury Department of the United States, following:

EXHIBIT A.

Award of compensation, No. 7268; fine No. 5437.

DISTRICT OF NEW YORK:

Whereas on the 29th day of June, 1869, a fine was paid by
21 T. H. Vetterlein and Sons for a violation of the first section of the act of March 3d, 1863; and whereas the amount of such fine, after making all legal deductions, which deductions have been duly passed upon by the accounting officers, being the sum of $21,347.40, has been paid into the Treasury of the United States:

Therefore by virtue of the authority vested in the Secretary of the Treasury by the 4th section of an act of June 22d, 1874, "to amend the customs revenue laws and to repeal moieties," it is hereby ordered that the sum of $1,778.95 shall be awarded and paid to

Moses H. Grinnell, as collector; $1,778.95 to A. B. Cornell, as surveyor, and $1,778.95 to E. A. Merritt as naval officer.

Treasury Department, May 2d, 1885.

D. MANNING,
Secr'y of the Treasury.

Defendants objected to the receipt thereof on the ground that the jurisdiction of the Secretary of the Treasury to make the award has not been shown; that his powers are special and statutory and jurisdiction must be shown before his award can have any force and effect; also on the ground that it appears affirmatively on the face of the award that it is for some share or other compensation arising from the recovery of a fine and by the statute of the United States passed June 22, 1874, the power of the Secretary of the Treasury to make any such award was absolutely taken away and he was forbidden to make any such award.

These objections were each overruled and an exception upon each ground duly noted.

Said paper was then read in evidence.

Further to maintain the issues on their part, plaintiffs offered in evidence a paper certified under the seal of the collector of customs for the port of the city of New York, following:

22 EXHIBIT B.

CUSTOM-HOUSE, PORT OF NEW YORK, *May* —, 1885.

Received from W. H. Robertson, collector, the sum set opposite my name, being the compensation awarded to me in the matter of T. H. Vetterlein & Sons, as per award of compensation No. 7268, having signed duplicate receipt, fine No. 5437.

As informer, —— ——.
As seizing officers, —— ——.

M. H. Grinnell------	$1,778 95	Geo. S. Bowdoin & Irving Grinnell, executors of Moses H. Grinnell, by Roger M. Sherman, attorney for ex'rs.
A. B. Cornell--------	$1,778 95	A. B. Cornell, by Roger M. Sherman, attorney.
C. T.	$3,557 90 T. H.	

A true copy of a paper on file in the collector's office.
C. T. E. S. HEDDEN, *Collector.*

{ Seal Collector of Customs, Dist. of New York, Port of New York. }

23 Defendant objected to the receipt thereof on the ground that the certification upon the basis of which the paper is offered is not competent evidence by statute or at common law; also that it purports to be part of the proceedings in the Treas-

ury matter, for which no proof has yet been offered of the jurisdiction of the Secretary.

These objections were each overruled and an exception upon each ground duly noted.

Said paper was then read in evidence.

Further to maintain the issues on their part plaintiffs called as a witness ROLAND C. ANTHONY, who testified as follows:

I am an average adjuster. I have entire management of the estate of Moses H. Grinnell, deceased. On June 1, 1885, I presented a bill to defendant. This is it as I presented it.

(Paper received in evidence.)

EXHIBIT C.

Received New York, June 1, 1885, of Roger M. Sherman, seventeen hundred and twenty $\frac{36}{100}$ dollars, in full for settlement of award by the United States Government in the Vetterlein case—

Amounting to	$2,023 95
Less his fee, 15 per cent	303 59
	$1,720 36

As per our power att'y to him, under date of April 10, 1883.

IRVING GRINNELL,
G. S. BOWDOIN,
Executors of the Estate of Moses H. Grinnell.

Defendant objected to paying, refused to pay, and has not since paid anything.

Upon cross-examination the witness testified:

24 The defendant stated substantially at the interview that since the award the matter had been reopened by the Secretary of the Treasury and was still in debate, and that he declined to pay it until that matter should be settled.

Upon motion of plaintiffs the complaint was then amended at the beginning of the third paragraph by striking out "on or about the ninth," and inserting in lieu thereof "and prior to the second."

Thereupon plaintiffs rested.

Defendant then moved to dismiss the complaint upon the following grounds:

First. That the plaintiffs have entirely failed to prove any collection of money, which, under the statutes of the United States, gives the Secretary of the Treasury jurisdiction to make any such award as that here relied upon.

Second. That the cause of action proceeds upon a statement of a fiduciary relation, a relation of principal and agent or of client and attorney, and by the amendment of June, 1886, to sec. 549 of the Code, in view of sec. 3477, Revised Statutes of the United States,

the plaintiffs have entirely failed to show any such relation, and cannot in this action, therefore, recover on the cause of action set forth.

Third. That this court has no jurisdiction of the cause of action alleged in the complaint.

Fourth. That the complaint proceeds upon an averment of conversion, and it appears from the testimony of the witness Anthony that there was no conversion, and there is no further proof on the subject.

This motion was denied by the court and an exception upon each ground duly noted.

25 Thereupon, to maintain the issues on his part, defendant read in evidence the deposition, duly taken at the city of Washington, D. C., and returned by commission, of NATHANIEL A. ROBBINS, who testified as follows:

I have been a clerk in the United States Treasury since October, 1865. I am the immediate official custodian, under the chief of division in the Secretary's office, of any books, papers, or records relating to the disposition of proceeds of seizures or penalties or to awards of moieties or rewards under customs revenue laws. My duty is to prepare the awards of compensation (formerly orders of distribution) for the Secretary's signature, and to make briefs in the contested or questionable cases. On or about October 6, 1869, a seizure was made of 518 bales of tobacco imported by Theodore H. Vetterlein & Sons in the vessel Isola, and proceedings for forfeiture commenced against them in the eastern district of New York and reported to the Treasury Department. The same was recorded seizure number 5437. The report by the commissioner of customs to the Secretary of the Treasury is with the papers at the Court of Claims.

Subsequently collections of $2,940, on January 25th, 1882, and $21,328, on March 27th, 1885, were credited to the account of said seizure. A report was made by me to the Secretary of the Treasury that said collections were proceeds of said seizure and should be distributed as such under section 26 of the act of June 22, 1874, and an award, among others, to Moses H. Grinnell of $1,778.95 was made on or about May 9, 1885, upon such report. My brief is filed at the Court of Claims. For my report see Exhibit A.

EXHIBIT A.

Award of compensation No. 7268; seizure No. 5437.

DISTRICT OF NEW YORK:

26 Whereas, on the 29th day of June, 1869, certain merchandise, conveyed into the above-named district per T. H. Vetterlein & Sons, were seized for a violation of section 3082 of the Revised Statutes of the United States and was subsequently forfeited; and whereas the proceeds of such forfeiture, after making all legal deductions, which deductions have been duly passed upon by

the accounting officers, *of* amount to the sum of $21,347.40, and have been paid into the Treasury of the United States: Therefore, by virtue of the authority vested in the Secretary of the Treasury by the 4th section of the act of June 22, 1874, "to amend the customs revenue laws and to repeal moieties," it is hereby ordered that the sum of $1,778.95 shall be awarded and paid to M. H. Grinnell, as collector; $1,778.95 to A. B. Cornell, as surveyor, and $1,778.95 to E. A. Merritt, as naval officer.

D. MANNING,
Secretary of the Treasury.

Treasury Department, May 2, 1885.

The witness continued:

On June 22, 1885, the Secretary of the Treasury made the following decision, as appears of record in the Treasury Department:

"Memo. Vetterlein case.

TREASURY DEPARTMENT, *June* 22, 1885.

Respectfully referred to the Solicitor of the Treasury for his opinion upon the whole question of the award, as shown by all the papers herewith transmitted.

C. S. FAIRCHILD,
Ass't Sec'y."

Subsequently, upon the receipt of the advice of the Solicitor of the Treasury, the whole question of the award in the Vetterlein case was sent to the Court of Claims under the act of March 3, 1883.

Secretary Sherman gave an official construction to the act of June 22, 1874, in the case of Jackson, and following is a correct copy thereof:

27

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *June* 27, 1877.

In the Matter of the Claim of FREDERICK S. JACKSON for Reward as Informer in the Case of United States *v.* Eben B. Jordan and Others.

Allow to Frederick S. Jackson $5,000 in full for reward as informer; no allowance to be made to any other person. The act of June 22, 1874, vol. 18, p. 186, was intended to repeal all provisions for shares to Government officers (see sec. 2), and the salaries of collectors, surveyors, and naval officers in the principal ports were by that act (section 23) increased from July 1, 1874, to compensate for their loss of moieties.

The Secretary has power under section 26 to make allowance to Government officers in cases commenced before the passage of the act; but as this case was commenced on May 1, 1874, the month before the passage of the act, it is not a proper case for such allowance.

The amount of allowance to informers in cases commenced either before or after the passage of the act is limited by section 4 to $5,000.

JOHN SHERMAN, *Secretary.*

The evidence was thereupon closed. The foregoing is all the evidence in the cause.

The court thereafter, on the 20th day of November, 1886, filed the decision and findings of record herein, and the defendant thereupon duly filed and served his notice of exceptions thereto as follows:

The defendant excepts to each of the following findings of fact proposed by the plaintiffs herein and found by the court and filed herein November 20, 1886, to wit, to so much of the finding numbered third as finds that the Secretary of the Treasury duly directed any moneys to be paid to Moses H. Grinnell; also to that numbered fourth, and particularly to so much thereof as finds that the plaintiffs made the defendant herein their lawful
28 attorney to collect any interest in fines and penalties; also to that numbered fifth; also to that numbered sixth; also to the conclusion of law found upon said findings of fact.

And thereupon the defendant prays his case and exceptions, which is settled and ordered on file as above.

CHAS. J. NEHRBAS, *J. C. C.*

City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, etc.,
against
ROGER M. SHERMAN.

Defendant's Exceptions.

The defendant excepts to each of the following findings of fact proposed by the plaintiffs herein and found by the court and filed herein November 20, 1886, to wit, so much of the finding numbered third as finds that the Secretary of the Treasury duly directed any moneys to be paid to Moses H. Grinnell; also to that numbered fourth, and particularly to so much thereof as finds that the plaintiffs made the defendant herein their lawful attorney to collect any interest in fines and penalties; also to that numbered fifth; also to that numbered sixth; also to the conclusion of law found upon said findings of fact.

CHARLES C. MARBLE,
Def't's Att'y, 59 Pine St., City.

John Reid, Esq., clerk of the city court of New York; Messrs. Evarts, Choate & Beaman, plaintiffs' attorneys.

29 At a general term of the city court of New York held at the city hall, in the city of New York, on the first day of February, 1887.

Present: Hon. Ernest Hall, Hon. Edward Browne, justices.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Plaintiffs and Respondents,
against
ROGER M. SHERMAN, Defendant and Appellant.

Roger M. Sherman, the defendant in the above-entitled action, having appealed to the general term of this court from the judgment heretofore entered in said action on the 23d day of November, 1886, and said appeal having come on to be heard in its order on the calendar, after hearing Mr. Roger M. Sherman, the defendant, in person in support of said appeal, and Mr. Treadwell Cleveland, of counsel for the plaintiffs, in opposition thereto, and due deliberation having been thereupon had, now, upon motion of Evarts, Choate & Beaman, attorneys for the said plaintiffs and respondents, it is—

Ordered that said judgment so appealed from as aforesaid be, and the same is hereby, in all respects affirmed with costs.

30 City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Plaintiffs and Respondents,
against
ROGER M. SHERMAN, Defendant and Appellant.

Judgment. February 2d, 1887.

The appeal of Roger M. Sherman, defendant in the above-entitled action, to the general term of this court from the judgment heretofore entered in said action on the 23d day of November, 1886, having been heard and decided, and the said general term having, by an order duly entered, bearing date the 1st day of February, 1887, directed that such judgment so appealed from be affirmed with costs, and the costs of the plaintiffs having been taxed at the sum in that behalf hereinafter stated, now, on motion of Evarts, Choate & Beaman, attorneys for the plaintiffs and respondents in said action, it is—

Adjudged that the said judgment herein entered the 23d day of November, 1886, be, and the same is hereby, in all respects affirmed, and that Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, the plaintiffs aforesaid, recover of Roger M. Sherman, the defendant aforesaid, the sum of eighty-seven dollars and fifty-eight cents, the amount of their costs herein as taxed, and that they have execution against said defendant therefor.

31 City Court of New York. General Term.

IRVING GRINNELL *et al.*, as Executors, &c., Respondents, *against* ROGER M. SHERMAN, Appellant. } Heard by Hall and Browne, JJ.

Appeal from a judgment in favor of plaintiffs entered upon a decision of the court at trial term.

R. M. Sherman, Esq., appellant, in person; Treadwell Cleveland, Esq., for respondents.

HALL, *J.*:

The plaintiffs had a claim against the Government of the United States for moneys due their testator; they employed defendant as their attorney to prosecute and collect it.

On May 2, 1886, the Secretary of the Treasury awarded and directed to be paid, in discharge of said claim, the sum of $1,778.95, and on or about that date said sum was paid to defendant, as attorney for plaintiffs, and he refused to pay it over to them upon demand, and they brought this action to recover it.

Defendant seeks to justify his refusal to pay over by the claim that since the money was paid over to him the matters out of which it arose or accrued have been reopened by the Government and referred to the Court of Claims, and he fears that in case the award should be revoked that he may be compelled to repay the money to the Government.

Defendant's relations with plaintiffs were simply as at-
32 torney in law, and in fact the money was paid by the Government to them, not to him; he was a mere conduit through which it passed; his receipt was their act, not his own; his acts were their acts and binding upon them; the money was theirs, not his, and he should have paid it over immediately upon its receipt. Any claim which the Government may have now or hereafter will be against plaintiffs, not against defendant. The plaintiffs are estopped from claiming in any future proceeding that they have not received the money, as it has been paid to the person authorized by them to receive it.

It does not lie with defendant to assert that the money was wrongfully paid over; he made and maintained the claim, and the money was recovered as the result of his efforts.

I have carefully examined the elaborate and ingenious brief of defendant and the numerous authorities cited, but I fail to discover their applicability to the facts of this case.

No new title, adverse or superior to plaintiffs, is asserted in this case. No demand has been made upon defendant to deliver the money over or to withhold it from the plaintiffs, and no step contemplating or looking towards a disturbance of plaintiffs' title was taken until long after the money was demanded and should have been paid over. It would seem almost preposterous to assert that plaintiffs are bound to allow their money to lie in the hands of their

attorney until the initiation and conclusion of some imaginary proceeding in behalf of the Government. The defendant stands in no different position from any other custodian of plaintiffs' money; it has been paid legally to them and they have the right to control it.

Defendant seems to be much more tender of the interests of the United States than its officers are. No claim has been made upon him by the Government; no notice has been given to him not to pay over to his clients, and yet he seeks to hold the money for an indefinite time until some one does make a demand upon him, but his first duty is to his clients.

33 The argument of defendant is certainly learned and ingenious, but it fails to convince the court that he is entitled to retain plaintiffs' money.

In the case of Peyser *vs.* Wilcox and other cases cited by defendant the moneys in the hands of the attorney or agent were demanded by third parties, who were the real owners, not by parties who had paid the moneys to the attorney for his principal nor under a claim that at some future time a proceeding might be taken by which they might become entitled to it.

The decision of the trial justice was right, and the judgment must be affirmed with costs.

I concur.

EDWD. BROWNE, *Justice.*

City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, Respondents,
against
ROGER M. SHERMAN, Appellant.

GENTLEMEN: The defendant appeals to the court of common pleas for the city and county of New York from the judgment of the city court of New York upon a determination at general term entered in this action in the office of the clerk of said court on the 2d day of February, 1887, and thereupon to bring up for review the

34 order entered therein on that day affirming the judgment entered therein on the 23d day of November, 1886, and each and every part thereof.

Dated February 21, 1887.

CHARLES C. MARBLE,
Appellant's Attorney, 59 Pine Street, New York.

To Evarts, Choate & Beaman, pl'ffs' att'y-; John Reid, clerk, &c.

35 Copy.

City Court of New York.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, *against* ROGER M. SHERMAN. } Return to Common Pleas, on Appeal from Judgment of City Court, General Term.

The city court of New York, pursuant to the statute regulating appeals from judgments of the said city court rendered at a general term thereof to the court of common pleas for the city and county of New York, do hereby return to the said court of common pleas that the proceedings prior to the trial, testimony taken thereat, and judgment rendered thereon in the said city court and the appeal taken therefrom to the general term of said court appear in and by the printed case on appeal annexed hereto and forming part of this return. The appeal so taken was argued at the general term of said court, and the judgment rendered at the trial term was affirmed with costs, as more fully appears by the order of said general term hereto annexed and forming part of this return, on which order judgment was in due form entered, and an appeal was thereafter taken to the court of common pleas in and for the city and county of New York, and the notice of appeal is also annexed hereto and forms part of this return, and that the matters and things aforesaid comprise all the proceedings in the said city court, all of which is respectfully submitted.

New York, February 25th, A. D. 1887.

By the court:

JOHN REID, *Clerk.*

Record of the General Term.

Vote for affirmance, two.

Opinion filed by Hall, J.

JOHN REID, *Clerk.*

[Endorsed:] City court of New York. —— —— against —— ——. Return from the city court. John Reid, clerk. Remittitur filed March 22, 1887.

36 At a general term of the court of common pleas for the city and county of New York held in the county court-house, in the city of New York, on the 25th day of April, 1888.

Present: Hon. Richard L. Larremore, Hon. Henry W. Allen, and Hon. Henry W. Bookstaver, judges.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will of Moses H. Grinnell, Plaintiffs, Respondents, *vs.* ROGER M. SHERMAN, Defendant, Appellant.

A motion having been heretofore made herein for leave to appeal to the court of appeals on behalf of the defendant, appellant, and

said motion having been, on motion of plaintiffs, by an order entered herein May 2nd, 1887, dismissed by default, and a motion coming on to be heard upon an order to show cause, dated May 9, 1887, and papers therein specified to open said default and to vacate said order of May 2nd, 1887, and for leave to appeal to the court of appeals herein, now, on reading and filing said order to show cause and upon the papers therein specified, after hearing James B. Lockwood, Esq., of counsel for said defendant, in support of said motion and Evarts, Choate and Beaman, of counsel for plaintiffs, op-
37 posed, it is ordered—

That said motion to open said default and vacate said order be, and the same hereby is, granted and said motion for leave to appeal to the court of appeals denied.

A copy.

NATH'L JARVIS, JR., *Clerk.*

38 At a special term of the city court of New York held at chambers thereof, in the city hall, in the city of New York, the 28th day of March, 1887.

Present: Hon. Ernest Hall, justice.

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, Respondents,

against

ROGER M. SHERMAN, Appellant.

It appearing by the remittitur from the court of common pleas of the city of New York in the above-entitled action filed in the office of the clerk of this court on the 21st day of March, 1887, that the appeal of Roger M. Sherman, the defendant therein, from the judgment of the general term of this court to the general term of the court of common pleas of the city of New York has been dismissed with costs, and that said general term of the court of common pleas, by an order bearing date the 10th day of March, 1887, directed that said judgment so appealed from be affirmed with costs, and that the judgment of affirmance be made the judgment of this court, now, on motion of Evarts, Choate and Beaman, attorneys for the plaintiffs, it is—

Ordered that the judgment of the general term of the court of common pleas be, and the same is hereby, made the judg-
39 ment of this court, and that the same be enforced according to law.

40 City Court of New York.

IRVING GRINNELL and GEORGE S. Bowdoin, as Executors of the Last Will and Testament of Moses H. Grinnell, Deceased, *against* ROGER M. SHERMAN. } Judgment. March 29, 1887.

The appeal of Roger M. Sherman, the defendant in the above-entitled action, to the general term of the court of common pleas of the city of New York from the judgment of the general term of this court bearing date February 1, 1887, and heretofore entered in said action on the 2nd day of February, 1887, in the office of the clerk of this court and affirming a judgment of this court in favor of said plaintiffs and against said defendant for the sum of twenty-one hundred and fifteen dollars and thirty-five cents, entered in the office of the clerk of this court on the 23d day of November, 1886, having been heard and decided, and the said general term of the court of common pleas having by an order bearing date and duly entered March 22, 1887, directed that such judgment so appealed from be affirmed with costs, and the costs of the plaintiffs having been taxed at the sum in that behalf hereinafter stated, now, on motion of Evarts, Choate and Beaman, attorneys for the plaintiffs, respondents, it is—

Adjudged that the said judgment herein entered on the second day of February, 1887, be, and the same is hereby, in all respects affirmed, and that Irving Grinnell and George S. Bowdoin, as executors
41 of the last will and testament of Moses H. Grinnell, deceased, the plaintiffs aforesaid, recover of Roger M. Sherman, the defendant aforesaid, the sum of sixty-nine dollars and seventy-one cents, the amount of their costs herein as taxed, and that they have execution against the said defendant therefor.

JOHN REID, *Clerk.*

Endorsed: Satisfied March 29, 1887. Filed March 29, 1887.

42 Supreme Court of the United States, of October Term, 1888.

ROGER M. SHERMAN, Plaintiff in Error, *vs.* IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, Defendants in Error. }

Afterwards, to wit, on the second Monday in October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Roger M. Sherman *in propria persona* and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

That therein was drawn in question the validity of certain statutes of and an authority exercised under the United States, and the decision is against their validity; and therein is drawn in ques-

tion and specially claimed on the part of the plaintiff in error certain rights, privileges, and immunity under the constitution and certain statutes of the United States and under certain authority exercised under the United States, and the decision is against the right, privileges, and immunity specially set up and claimed and more especially as set forth following, to wit:

Whereas by the answer it was specially set up and claimed that the subject of the suit was money of the United States improperly paid from the Treasury by mistake and contrary to law, in which the plaintiffs have no right, title, or interest; and that the Secretary of the Treasury had, before suit commenced, set aside
43 and vacated his award of said money, and that the plaintiff in error is a trustee for the United States in respect to said money, and that no valid agency existed or could exist by force of the statutes of the United States to collect, receive, or pay over said money under the circumstances; and

Whereas upon the trial of said suit, as appears from the bill of exceptions, each, all, and every the averments in that behalf were established by the undisputed evidence; and

Whereas, upon the close of the case of the plaintiffs in the court below, this plaintiff in error moved the court to dismiss the complaint for the reasons there assigned, appearing by said bill of exceptions, which said motion was denied and to said denial exception taken; and

Whereas said court by its decision held that the plaintiff in error was estopped from asserting each, any, and all of the matters specially set up and claimed as aforesaid, and overruled each, all, and every the contentions aforesaid; and

Whereas by the finding of fact made by said court upon said trial said court decided against each, all, and every the contentions aforesaid; and

Whereas, by the conclusion of law made by said court, said court decided against each, all, and every the contentions aforesaid; and

Whereas the plaintiff in error upon said trial insisted that under the laws of the United States he could not be in anywise affected or bound by a certain paper marked Exhibit A without proof of the jurisdiction of the Secretary of the Trrasury to make the award thereby appearing; nevertheless said paper was received in evidence and made the basis of recovery against him, and his several objections in that behalf were overruled; and
44 Whereas the plaintiff in error upon said trial insisted that under the laws of the United States he could not be in anywise affected or bound by a certain paper marked Exhibit B, and that the certification thereof was not by the head or acting chief officer for the time being of a department of the Government of the United States; nevertheless said paper was received in evidence and made the basis of recovery against him and his several objections in that behalf overruled; and

Whereas the decision and judgment aforesaid were given for the plaintiffs below, and by the law of the land and upon each, all, and

every the contentions, claims, and matters aforesaid the decision and judgment should have been given for the plaintiff in error.

And for each and all of said reasons said city court of New York erred in rendering its decision and judgment aforesaid and in each and every part of said judgment and its subsequent proceedings thereupon.

The said Roger M. Sherman prays that the judgment aforesaid and all proceedings thereon and subsequent thereto may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by occasion of the said judgment.

ROGER M. SHERMAN,
Plaintiff in Error, 56 *Wall St., New York.*

45 Supreme Court of the United States.

ROGER M. SHERMAN, Plaintiff in Error,
vs.
IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of the Last Will of Moses H. Grinnell, Defendant in Error.

Know all men by these presents that the American Surety Company of New York is held and firmly bound unto Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, in the sum of two hundred and fifty dollars to be paid to the said Irving Grinnell and George S. Bowdoin, as executors, their successors, heirs, and assigns, executors, and administrators; to which payment, well and truly to be made, the American Surety Company binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal. Dated this 5th day of May, 1888.

Whereas the above-named Roger M. Sherman hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the city court of New York against said plaintiff in error in favor of said Irving Grinnell and George S. Bowdoin, as executors, on the 23rd day of November, 1886, docketed on the 24th day of November, 1886, and the several judgments of affirmance thereof:

Now, therefore, the condition of this obligation is such that if the above-named Roger M. Sherman shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

AMERICAN SURETY COMPANY
OF NEW YORK,
[SEAL.] By HENRY D. LYMAN, *Vice-President.*
FRED. F. NUGENT, *Secretary.*

46 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this 5th day of May, 1888, before me personally appeared Henry D. Lyman, vice-president of the American Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York; that he knew the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as vice-president of said company by like authority, and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, chapter 486, of the session laws of 1881; and the said Henry D. Lyman further said that he was acquainted with Fred. F. Nugent and knew him to be the secretary of said company; that the signature of the said Fred. F. Nugent subscribed to the said instrument is in the genuine handwriting of the said Fred. F. Nugent, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Henry D. Lyman, vice-president.

[SEAL.] H. G. HINTON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

At a meeting of the board of directors of the American Surety Company held at the office of the company on the 9th day of June, 1886, on motion it was—

"Resolved, That, in pursuance of chapter 416, laws of 1886, amending section eight hundred and eleven of the Code of Civil Procedure, the president or vice-president be, and either of them is, hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for or on behalf of the company and to attach thereto the seal of the company, the same to be attested by the secretary or assistant secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Frederick F. Nugent, secretary of the American Surety Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at the city of New York, this 5th day of May, 1888.

[SEAL.] FRED. F. NUGENT, *Secretary.*

The foregoing bond is approved as to form and amount and sufficiency of surety, May 9th, 1888.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

46½ [Endorsed:] Supreme Court of the United States. Roger M. Sherman, pl'ff in error, ag'st Irving Grinnell & ano., ex'rs, &c., def'ts in error. Copy. Bond for costs under writ of error.

Evarts, Choate & Beaman, att'ys for def'ts in error.

GENTLEMEN: Within is a copy of a bond this day filed in the office of the clerk of the city cou-t of New York.

Dated New York, May 11, 1888.

ROGER M. SHERMAN,
Pl'ff in Error, 140 *Nassau St., New York, N. Y.*

47 UNITED STATES OF AMERICA, *ss:*

To Irving Grinnell and George S. Bowdoin, as executors of the last will and testament of Moses H. Grinnell, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the city court of New York, wherein Roger M. Sherman is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Blatchford, an associate justice of the Supreme Court of the United States, this 9th day of May, 1888.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] U. S. Supreme Court. Roger M. Sherman, pl'ff in error, *vs.* Irving Grinnell and George S. Bowdoin, def'ts in error. Citation. Roger M. Sherman, pl'ff in error, 140 Nassau St., New York, N. Y.

48 Supreme Court of the United States.

ROGER M. SHERMAN, Plaintiff in Error,
against
IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, &c., Defendants in Error.

Affidavit of Service on Person in Charge.

STATE AND COUNTY OF NEW YORK, *ss:*

Joseph A. Thompson, being duly sworn, says that he is of the age of twenty-one years and upwards; that on the 11th day of May, 1888, between the hours of 10 a. m. and 2 p. m., he served a copy of the annexed citation, writ of error, and bond on Evarts, Choate and Beaman, the attorneys for the defendants in error in the above-entitled action, at their office, No. 52 Wall street, in the city of New York, by leaving the same with Prescott H. Butler, one of said attorneys of said service, exhibiting to him the original citation.

Dated the 11th day of May, 1888.

J. A. THOMPSON.

Sworn to before me this 11th day of May, 1888.

SAMUEL S. PERRY,
Notary Public, N. Y. Co.

[Endorsed:] Supreme Court of the United States. Roger M. Sherman, pl'ff in error, *vs.* Irving Grinnell & *al.*, def'ts in error. Return to writ of error. City court of New York. Roger M. Sherman, pl'ff in error, 140 Nassau St., New York, N. Y.

Endorsed on cover: New York city court. No. 245. Roger M. Sherman, plaintiff in error, *vs.* Irving Grinnell & George S. Bowdoin, executors of Moses H. Grinnell, deceased. Filed October 15, 1888.

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In the Supreme Court of the United States.

No. 245. October Term, 1891.

ROGER M. SHERMAN,
Plaintiff in Error,

against

IRVING GRINNELL and another,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ROGER M. SHERMAN,
In propria persona,
140 Nassau Street, New York, N. Y.

The Evening Post Job Printing House, New York.

In the Supreme Court of the United States.

ROGER M. SHERMAN,
Plaintiff in Error,

AGAINST

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors, &c., of MOSES H. GRINNELL,
Defendants in Error.

BRIEF FOR PLAINTIFF.

Statement.

This is an action at law brought by defendants in error, in the City Court of New York, against plaintiff in error, to recover the sum of $1,778.95, the amount of an award of public moneys of the United States, received by him, as they alleged, as their attorney in fact.

The cause was tried by the Court without a jury and resulted in a judgment in favor of these defendants.

The character of the action is thus described in the words of defendants in error:

"This action was in *tort*. It was not commenced to recover a balance due, to recover a sum of money collected, less a sum due to defendant, but it was to recover the whole sum collected by the defendant, by reason of his tortious conversion of the same. The Judge at the Trial Term found that the defendant converted to his own use the sum sued for, namely, $1,778.95. The judgment of the Court cannot authorize any other conclusion than that this action is not in contract, but is in *tort*."

The argument now proceeds upon this assumption of the nature of the action (Record, Complaint, p. 6, conclusion of law, p. 10, exception thereto, p. 16, judgments of affirmance, pp. 17, 22).

This, then, being an action of *trover*, depends upon the legal title of the defendants in error, following:

It is alleged in the complaint that the testator, Moses H. Grinnell, became entitled to share in the proceeds of certain fines and penalties under customs revenue laws, incurred by Vetterleins in 1869 and recovered by the United States by proof of debt in bankruptcy in 1885; that by a power of attorney dated April 10, 1883, given to this plaintiff by these defendants, he collected in 1885 the sum sued for and refused, upon demand, to pay it over and wrongfully misapplied it to his own use (Record, pp. 5, 6, 9, 10).

The plaintiff in error, by his answer, denied and raised an issue as to the receipt of any money, as alleged in the complaint (Record, p. 7).

He further asserted an affirmative defense (Record, p. 7, 8), which presents the important question before this Court.

There was no dispute as to the facts in this particular, and it is established that, whereas Mr. Grinnell had in 1869, and at all times until the 22d day of June, 1874, an inchoate claim under the Act of

March 2, 1867, to one-twelfth of whatever fines, penalties or forfeitures might be recovered by the United States in the Vetterlein case; by the Act of June 22, 1874 (18 Stat., 186) and before the recovery of the money in question, that claim was annulled (Secs. 2, 26); all the proceeds of fines, penalties and forfeitures were required to be paid into the treasury (Sec. 2); and existing rights of the United States, *only*, were saved (Sec. 26). Mr. Grinnell's salary was increased (Sec. 23) to compensate him for his loss of moieties. There was but a single exception saving his rights.

The exception (Sec. 26) is that in cases of forfeiture where seizure has been made for smuggling before the passage of the Act of June 22, 1874, the Secretary of the Treasury has power to make allowances to government officers, as provided in the 4th section of the act.

Besides the fines and penalties incurred by Vetterleins there had been a seizure in the Eastern District of New York of the cargo of the *Isola*. This case was known in the treasury as seizure No. 5437. When the penalties recovered in the bankruptcy proceedings were received in the treasury, they were erroneously credited to this seizure. Such claim as was made by this plaintiff on behalf of defendants in error was upon a construction of the Act of 1874, which has since been decided adversely by this Court, respecting the corresponding provisions of the internal revenue law.

U. S. *v.* Conner, 138 U. S., 61.

Misled by the bookkeeping of seizure No. 5437, however, the Secretary made the award in question, upon the erroneous assumption that the moneys were the proceeds of the seizure in 1869, of the *Isola*, upon which he might under the Act of 1874, make an award; and in ignorance that they were the proceeds of penalties (Record, pp. 7, 8, 11, 14, 15 and 16).

Upon June 1, 1885, when defendants in error made a demand upon plaintiff, he replied and the fact

was, that since the award, the matter had been re-opened by the Secretary and was still in debate; and he declined to pay until the matter should be settled (Record, pp. 13–15). In due course of business twenty-two days afterwards, the whole award was formally reopened and the award was set aside by sending the matter as *res nova* to the Court of Claims under the Bowman act (Record, p. 15).

This was the condition of the matter when this action was commenced.

The courts below considered that this plaintiff was precluded by the receipt of the money as attorney for these defendants, from alleging any of these matters; and the judgment was rendered, avoiding them, by the application of the doctrine of estoppel (Record, pp. 10, 18, 19).

Consistently with this view, the Court refused plaintiff the opportunity of showing the actual demands of the Treasury upon him, holding that such proof would not strengthen his case (Record, p. 10).

The trial Court admitted as evidence of the receipt of money and of the conventional relation of principal and agent, against plaintiff's objection and exception, a copy of an alleged receipt upon its certification by the Collector of Customs at the port of New York (Record, pp. 12–13).

Attention is invited to the fact that the power of attorney which is the foundation of the title of these defendants, is one executed before the allowance of the claim, and, in all respects, without regard to Section 3477, U. S. Rev. Statutes (Record, p. 6, 14).

The errors assigned (Record p. 23, 24), briefly stated are that this plaintiff specially claimed immunity from this suit; because the subject of the suit was money of the United States improperly paid from the Treasury by mistake and contrary to law, in which these defendants have no right, title or interest; because the Secretary of the Treasury had, before suit commenced, set aside and vacated his award of said money; because this plaintiff is a trustee for the United States in respect to said

money; and because no valid agency existed or could exist by force of the statutes of the United States, to collect, receive or pay over said money, under the circumstances; and that said claim was improperly overruled.

Also that this plaintiff was improperly held to be estopped from asserting these matters.

Also that the receipt, Exhibit B, certified by the Collector, was improperly received against him, because the certification was not by the head or acting chief officer for the time being of a department of the Government of the United States.

The assignments point out the various forms in which these contentions appear in the record.

The case was heard in the highest State Court to which it could be taken (Record, pp. 20, 21).

All the evidence is in the bill of exceptions (Record, p. 16).

ARGUMENT.

I.

This action can be sustained only upon a strict legal title.

It does not lie with these defendants to deny the technical character of this action as one in *trover*. The complaint charged that the specific money sued for was wrongfully misapplied (p. 6); the Court found that the defendant below converted the sum sued for to his own use (p. 10); he excepted to this conclusion of law (p. 16); and the judgment was affirmed (p 17, 22).

In New York, the distinction between an action of *trover* and one in *assumpsit* is still maintained; and plaintiff must recover upon a strict legal title in him-

self, and not upon a mere better equity than defendant.

Walter *v.* Bennett, 16 N. Y., 253, 254.
Salt Springs National Bank *v* Wheeler, 48 N. Y., 494.
Sager *v.* Blain, 44 N. Y., 448.
Fulton *v.* Fulton, 48 Barb., 581.
Garland *v.* Davis, 4 How. U. S., 144.

No merely equitable right to the money sued for, therefore, will maintain the issues herein on the part of these defendants. The inquiry must be whether they have a strict legal title.

II.

The award was in violation of a Federal statute and absolutely void. Defendants, therefore, had no title and plaintiff was not estopped.

By the Act of June 22, 1874, the United States exercised the sovereign right to withdraw their gift. A right which they had in cases of seizure, until condemnation (Mr. Justice Story, the brig *Hollen*, 1 Mason, 434); and in other cases until the money was paid away according to legislative will (Mr. Justice Johnson, U. S. *v.* Morris, 10 Wheat., 304; U. S. *v.* Conner, 138 U. S., 61).

In the face of this enactment, the physical act of issuing to this plaintift a warrant for the payment of an award in violation of the act, did not affect the title of the United States to its money or transfer any right thereto to these defendants; the Secretary had no power to make the award; he had no power to waive the right of the United States to the money, or in anywise to ratify the illegal act.

The plaintiff acted lawfully in urging upon the

Secretary the construction of the statute contended for in U. S. *v.* Conner, 138 U. S., 304. Had the Secretary adopted that view, being called upon to construe the law, upon the actual facts, his decision making the award, although in the light of that decision, it would have been erroneous, would not have been void; and, it may be, a different principle would apply.

But when it transpired that the Secretary, instead of acting upon that construction of the Act of 1874, had committed a pure error of fact and had, undesignedly, awarded, as proceeds of a seizure, what was in fact penalties; this plaintiff was fully charged with notice that the award was not voidable at the election of some Government officer, but void.

Reeside *v.* Walker, 11 How. U. S., 291.
Whiteside *v.* U. S., 93 U. S., 257.
Knote *v.* U. S., 95 U. S., 154.
Hart *v.* U. S., 95 U. S., 318.
Steele *v.* U. S., 113 U. S., 134.

There was, therefore, no estoppel.

Dunham *v.* Reilly, 110 N. Y., 373, 374.

III.

Plaintiff properly claimed immunity under the United States.

Plaintiff was immediately upon the discovery of these incurable defects in the award, converted into a trustee for the United States. He was liable to an action by them and these defendants could not therein protect him.

Lee *v.* Mathews, 10 Ala., 687.
Bayne *v.* U. S., 93 U. S., 643.
U. S. *v.* State Bank, 96 U. S., 35, 36.
Townson *v.* Wilson, 1 Camp., 396.

IV.

Upon the assumption that the conventional relation of principal and agent existed between these parties in the premises there was no estoppel in the circumstances.

The force of the defense is met in the courts below by the application of the doctrine of estoppel. This estoppel rests upon a relation of plaintiff as agent to defendants.

The plaintiff concedes that where an agent receives a voluntary payment of money from one acknowledging the right of the principal to it and competent to waive the defects in the title, the agent cannot set up for the other a right which that other does not set up for himself. The agent, then, has no interest in the question.

But the doctrine of estoppel, where the conventional relation of principal and agent indisputably exists, is subject to qualification. Where the agent is himself liable to the other upon a title better than that of his principal *and is charged upon that liability*, he may set up the right of that other against the principal.

In the ordinary case between man and man, the effectual way of showing that the agent *is* charged upon that liability is that he has paid to the other or, at least, has been notified not to pay to his principal. In some of the cases may be found language to the effect that such is the only admissible proof that he has yielded to a paramount title.

Elliot *v.* Swarwout, 10 Pet., 155, 156.
Sims *v.* Brown, 6 N. Y. Supreme Court R., 8.
Bettely *v.* Reed, 4 Q. B., 511.
Thorne *v.* Tilbury, 3 Hurl. & N., 534, 537.
Biddle *v.* Bond, 34 L. J., Q. B., 137.
Bank of U. S. *v.* Bank of Washington, 6 Pet., 8.
The Idaho, 93 U. S., 581.

But the requirement that the agent should have yielded to the paramount title is everywhere placed upon the reason that, otherwise, the claim of the other being waived, the agent might get the benefit for himself of that waiver which inures to the benefit of his principal.

The concession underlies all the cases that the agent who renders to another a paramount duty, does no wrong, and is under no conflicting duty, to his principal.

It results from the application of these principles to the facts of this case that, a payment of public moneys not being "voluntary," but *stricti juris*, there can be no waiver of the title of the United States to this fund; that the law charges plaintiff with liability, which no officer of the United States can discharge him from; that is the duty of the officers of the United States to recover the fund from him which it must be presumed they have done or will do; and that, within the true intent and meaning of the prescription of the Court in Thorne *v.* Tilbury (*supra*), "he depends upon the right and title and by the authority of" the United States.

The United States have given him that authority by law. The Constitution and statutes when they imposed upon him the duty to render back the fund to the United States, necessarily gave him the authority to withhold it from defendants. To this authority and duty the formal notice of the Secretary of the Treasury, had plaintiff been permitted to prove it, would have added nothing.

Bank of U. S. *v.* Bank of Washington,
6 Pet., 19.
Story on Agency, Sec. 300.

V.

But there was no agency in this matter and the doctrine of estoppel has no application.

The assumption, thus far, has been that the case is as favorable to defendants as the case of bailment. There the possession is immediately derived from the principal, a circumstance, as this Court has said, which raises a strong presumption that the bailor is entitled.

The Idaho, 93 U. S., 579.

But it is now contended that the circumstances here do not entitle the defendants to the application of the rule in bailment. The agency itself is denied. It is denied that the possession was, in contemplation of law, that of defendants.

Assuming that the receipt, Exhibit B (Record, p. 12), was properly received in evidence, yet, by its terms, it admitted receipt of what at the time was supposed to be the subject of the power. Defendants put in only part of the record upon the receipt and this objection was made (Record, pp. 12–13). The inference from that part withheld must be favorable to plaintiff.

The admission inferred from the receipt was an erroneous conclusion of law which does not bind plaintiff or estop him.

Smith on Merc. Law (8th Eng. Ed.), pp. 162, 163.

Bogardus *v.* New York Life Ins. Co., 101 N. Y., 337.

Dungan *v.* American Life, 52 Penn. St., 253.

Cutting *v.* Lincoln, 9 Abb. N. S., 436.

The defendants cannot say to plaintiff: You are our agent because you received our money. The

money is ours because you received it as our agent. This is a vicious circle. Either plaintiff is their agent because the power of attorney was effectual to make him such in respect to the award made, or there is no agency.

The defendants are here confronted with a dilemma. Either the power of attorney authorized plaintiff to recover only such award as should be lawfully made, or to recover what could be obtained by mistake and in violation of law.

If the former, it did not authorize the receipt of this award which was not lawfully made. This, it is submitted, is the correct view. The contract embodied in the power of attorney, like all contracts, must be construed in harmony with public policy. It is limited by operation of law to such scope as it may lawfully have. As these defendants could not lawfully receive such an award, themselves, they could confer no such authority upon plaintiff. As they could not themselves withhold possession from the United States, their authority could not justify plaintiff in so doing.

The Idaho, 93 U. S., 580.
Smith on Merc. Law (8th Eng. Ed.), p. 162, 163.
Story on Agency (9th Ed.), Secs. 235, 300 and Note 3, p. 366.

The recognition by the Treasury of plaintiff as agent to receive this award was vitiated by the same error which pervaded the award. There can be no valid agency in such an unlawful payment If the power could not authorize the receipt of this award it follows that it imposes no duty upon plaintiff in respect thereto.

Smith on Merc. Law (8th Eng. Ed.), p. 164, and note m.

"It is idle to talk of property passing."
Collins *v.* Ralli, 20 Hun, 254; affirmed 85 N. Y., 637.
U. S. *v.* State Bank, 96 U. S., 36.

The case, therefore, is the same as if there had been no power of attorney at all. The conventional relation of principal and agent, upon which this action rests, so far as the subject of the action is concerned, did not exist.

But if, on the other hand, the power of attorney did cover an award made by mistake and in violation of law, that contract is tainted, against public policy and void; no action will lie to give it effect.

Story on Agency, Secs. 238, 344.
Armstrong *v.* Toler, 11 Wheat., 258.
Holman *v.* Johnson, Cowp., 343.
Nellis *v.* Clark, 20 Wend., 31, 32.

VI.

A distinct defect in any theory of legal title is that the power of attorney relied upon is in violation, when applied to the receipt of the fund, of Section 3477, U. S. R. S.

Even if these defendants were entitled, as between this plaintiff and them to recover; their remedy was only by *assumpsit* for money had and received to their use.

Notwithstanding the decisions of this Court in earlier cases under Section 3477 U. S. R. S., it may be gathered from

Bailey *v.* U. S., 109 U. S., 439

that when a power of attorney obnoxious to that section has been executed, it may become valid between the parties.

Conceding that, however; it is contended that it could not transfer a legal title; but only operate in equity.

Mills *v.* Argall, 6 Paige, 581.

No title, therefore, exists in these defendants upon which they could maintain *trover*.

VII.

There is no equity in defendants' contention that they should recover the fund to render it to the United States.

They can be liable to the United States only upon an implied assumpsit which can arise only from the actual receipt of the money. The power of attorney being wholly inapplicable to the award made, creates no privity between defendants and the United States.

United States *v.* Bank of Columbus, 21 How. U. S., 356, 365, 366.

Marvin *v.* Universal Life Ins. Co., 85 N. Y., 282, 283.

Walsh *v.* Hartford Fire Ins. Co., 73 N. Y., 10.

It often happens in pension cases, or army and Indian claims, that large sums are collected by a single attorney for many dispersed clients. It will hardly answer the demands of public policy to hold that the Government must, where such sums are paid by mistake and without authority of law, look to the scattered, individual claimants; or that the attorney must, although he be aware of the error, pay over the money to his clients.

But if there were a liability in assumpsit there could be no recovery therefor in this form of action.

Walter *v.* Bennett, 16 N. Y., 253, 254.

It is unnecessary to discuss any liability *ex delicto*, because there can be no contribution to such liability.

VIII.

The admission of Exhibit B was prejudicial error.

This receipt (Record, pp. 12, 13) was admisible, if at all, only by operation of Section 944 of the New York Code of Civil Procedure. This provides that "a copy of a record or other paper remaining in a department of the Government of the United States is evidence, when certified by the head or acting chief officer for the time being of that department; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States, relating to certifying the same."

The Collector is not the head of any department. The paper in question could satisfy these requirements only when certified under the seal of the Treasury Department.

U. S. R. S., Sec. 882.

The error was material. An issue as to the receipt of money and a question whether its receipt was in the conventional relation of agent, were raised by the pleadings.

There was, it is true, a qualified admission (Record, p. 8), as part of the affirmative defense. Correctly regarded, in the light of the course of business in the Treasury, of which the Court will take notice, it was only an admission of the receipt of a Treasury warrant. It negatived the conventional relation asserted by defendants.

The receipt alleged in the complaint was denied (Record, p. 7).

This admission, therefore, did not dispense with proof of the actual receipt of money, or of the capacity in which it was received. There was no

evidence upon either issue except Exhibit B. These defendants could only take the defense as a whole.

Troy & Rutland R. Co. *v.* Kerr, 17 Barb., 581.

Goodyear *v.* De la Vergne, 10 Hun, 537.

Vanderbilt *v.* Schreyer, 21 Hun, 537, 541.

IX.

The suit was in effect aimed at public moneys of the United States; there was an entire failure of jurisdiction to render the judgment below.

The theory of the action is the identity of the thing demanded with the thing received.

Walter *v.* Bennett, 16 N. Y., 252–253.

The identical thing here was and always remained the money of the United States.

National Bank *v.* Insurance Co., 104 U. S., 54, 67, 68, 70.

Steele *v.* U. S., 113 U. S., 134.

When this fact was disclosed by the undisputed and indisputable evidence, no State court had jurisdiction to render a judgment, awarding this money to the plaintiffs below; but only to dismiss the complaint.

Carr *v.* U. S., 98 U. S., 438.

The Exchange, 7 Cranch, 116.

The Siren, 7 Wall., 152–154.

X.

The judgment should be reversed with costs of this Court and all intermediate courts to plaintiff in error against defendants in error, individually. The action was brought upon their claim, not that of their testator; the allegations of their representative capacity are mere description. Judgment should also be rendered commanding the Court below to dismiss the complaint, with costs.

Dated Washington, March 21, 1892.

ROGER M. SHERMAN,
In propria persona,
140 Nassau Street,
New York.

Office Supreme Court U. S.
FILED
MAR 25 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 245.—October Term, 1891.

ROGER M. SHERMAN,

Plaintiff in Error,

against

IRVING GRINNELL and GEORGE S. BOWDOIN, as Executors of Moses H. Grinnell, Deceased,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

EVARTS, CHOATE & BEAMAN,
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52 Wall Street, New York City.

HENRY W. HARDON,
TREADWELL CLEVELAND,
Of Counsel.

IN THE

Supreme Court of the United States.

ROGER M. SHERMAN,
Plaintiff in Error,

AGAINST

IRVING GRINNELL and GEORGE S. BOWDOIN as Executors of the Last Will and Testament of Moses H. Grinnell, deceased,
Defendants in Error.

No. 245.

IN ERROR TO THE CITY COURT OF NEW YORK.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

The defendants in error, plaintiffs below, are the executors of the estate of Moses H. Grinnell, deceased, formerly Collector of the Port of New York. In April, 1883, they employed the plaintiff in error as their attorney to collect certain moneys from the United States for them, and in May, 1885, he received $1,778.95, for which he gave the receipt, Exhibit B, in which he describes himself as their attorney (fol. 22). In June, 1885, they demanded that he turn over the said sum, but he refused to do so,

alleging in excuse that the moneys had been paid to him by the United States under a mistake of fact, and that accordingly the executors were not entitled to them.

Thereupon the executors began an action against their attorney in the City Court of New York. By consent the case was tried by the Court without a jury. The Court held that the defendant was estopped to go into the alleged defense, inasmuch as an agent can not be permitted to dispute his principal's title; and the executors' claim being established they had judgment (fol. 19). (The findings of fact are at pp. 8-9). This judgment was affirmed by the General Term of that Court (fol. 30), and again by the General Term of the Court of Common Pleas for the City of New York (fol. 40).

The plaintiff in error now seeks to review these judgments in this Court, and assigns three grounds of error, viz.:

1. That a Federal question was involved in the decision of the trial Court, that the defendant was *estopped to show* (*a*) that the moneys which were the subject of the suit were paid out of the United States Treasury under a mistake of fact; (*b*) that the Secretary of the Treasury had vacated his award of these moneys before this suit was begun, and (*c*) that no valid agency to collect and pay over these moneys could exist by force of the statutes of the United States.

2. That a Federal question was involved in the ruling of the trial Court admitting in evidence Exhibit A, a copy of the award of these moneys by the Secretary of the Treasury (fol. 43).

3. That a Federal question was involved in the ruling of the trial Court, admitting in evidence Exhibit B, the copy of the receipt for these moneys signed by the defendant (fol. 44).

Upon the face of the assignment of error, it appears that the trial Court *declined* to pass upon the supposed Federal questions which constitute the first alleged ground of error (fol. 43), deciding neither for nor against the validity of the Constitution or any statute of the United States; and that the supposed Federal questions embraced in the second and third alleged grounds of error, are in reality mere questions of the general or local law of evidence.

It is proper to observe at the outset that the facts as they were found by the trial Court are conclusive upon this appeal. This Court has no power to review them.

Republican, &c., Co. v. *Kansas, &c., Co.*, 92 U. S., 315–317.

Mr. Justice Miller for the Court there said:

> "In cases where the facts are submitted to a jury and are passed upon by the verdict in a common law action, this Court has the same inability to review those facts in a case coming from a State Court that it has in a case coming from a Circuit Court of the United States. This conclusiveness of the facts found extends to the findings by a State Court to whom they have been submitted by waiving a jury." Citing
>
> *Boggs* vs. *Merced Mining Co.*, 3 Wall., 304.

See also:

Baltimore, &c., R. R. Co. vs. *Hopkins*, 130 U. S., 210.

It is equally clear that this Court has no power to review the rulings upon the general law or the local law of the State of New York out of which this judgment grows. It may be plain as day that the judgment was wrong, both on the facts and on the law; but this Court will not therefore attempt to re-

view it unless it finds that a Federal question was involved within the meaning of the statute (Rev. Stat., § 709).

First Point.

There is no Federal question involved in the first ground assigned as error.

It is not sufficient in order to confer jurisdiction upon this Court that the Constitution or laws of the United States should have been in some way referred to upon a trial in a State Court; it must further appear that the Federal question *was actually decided*, and that its decision was necessary to the judgment in the case.

The plaintiff in error assigns it as a ground of error that the question he sought to raise *was not actually decided.* His quarrel with the Court below is not for deciding a Federal question, but for refusing to entertain it. It was held all along that an attorney cannot collect moneys for his principal and then hold them in defiance of his principal's title. At Trial Term the Court said (Nehrbas, *J.*):

> "He is estopped from denying his client's after having collected the money for him" (fol. 18).

At General Term on appeal, the Court said (opinion by Hall, *J.*):

> "It would seem preposterous to assert that plaintiffs are bound to allow their money to lie in the hands of their attorney until the initiation and conclusion of some imaginary proceeding in behalf of the Government. The defendant stands in no different position from any other custodian of plaintiffs' money; it

> has been paid legally to them, and they have the right to control it" (fol. 32).

The courts below would not consider the alleged claim of the United States to these moneys. They held the attorney to be estopped to raise such a claim. And accordingly that is what the attorney now assigns as error.

> "Whereas said Court by its decision held that the plaintiff in error *was estopped from asserting* any and all of the matters specially set up and claimed as aforesaid" (fol. 43).

The decision proceeded accordingly, not upon any Federal question, but upon a well-established rule of general law, abundantly supported by authority.

> "The defendant had collected money for her as her agent, and *he is estopped after collecting it for from denying her right to it.*"
>
> Per Ingraham, *J.*, in *Waldron* v. *Baker*, 4 E. D. Smith, 440.

And see:

> *Bernard* v. *Kobbe*, 54 N. Y., 520.
> *Merritt* v. *Millard*, 3 Ab. App., 291.
> *Mahler* v. *Hyman*, 17 N. Y. S., 588.
> *Murray* v. *Vanderbilt*, 59 Barb., 140, 149.
> *Hancock* v. *Gomez*, 58 Barb., 490.
> *Fogarty* v. *Jordan*, 2 Rob., 319.
> *Wharton, Agency*, § 242.

This Court cannot review questions of general law.

> *United States* v. *Thompson*, 93 U. S., 588–9.
> *Bank* v. *McVeagh*, 98 U. S., 332.

It will not help the plaintiff in error to say that two questions were presented to the State Court,

one Federal and the other non-Federal, unless he shows that the decision proceeded upon the Federal question.

Crossley v. *New Orleans*, 108 U. S., 105.

If this Court shall inquire into the propriety of the decision below it will unquestionably find that the decision was right.

It is preposterous to assert that the executors are bound to allow their money to lie in the hands of their attorney until the institution and conclusion of some imaginary proceeding on behalf of the United States. If they are bound to wait one day, or one year, they are equally bound to wait forever; and the doctrine is promulgated that an ordinary custodian has only to deny his principal's title, and set up an imaginary claim in some one else, and he may successfully defy all attempts of his principal to regain possession of his property. The mere statement of such a doctrine makes it impossible that it should find approval.

If the executors shall fail to recover their money in this action from their attorney they will be entirely without remedy in the premises. They would be estopped from claiming in any future proceeding against the United States that they have not received it, as it has been paid to the person authorized by them to receive it.

Stowe v. *United States*, 19 Wall., 13, 16.

Bailey v. *United States*, 109 U. S., 432, 438.

The monstrous result would be that this plaintiff, an attorney of this Court, an agent, a fiduciary, could violate with impunity his trust to defend and save the rights and property of his principals, and himself seize upon and securely retain them for his own uses.

Second Point.

There is no Federal question involved in the second ground assigned as error.

The second ground of alleged error is that Exhibit A, the award of compensation, was received in evidence without proof of the jurisdiction of the Secretary of the Treasury to make the award.

This is plainly a matter either of general law of evidence, which, as appears from the cases above cited, presents no Federal question, or else a matter of the local law of evidence, which is equally barren of all Federal question.

Poppe vs. *Langford*, 104 U. S., 770.

The trial Court did not assume to inquire into any authority of the Treasurer of the United States, nor into the validity of any statute of the United States, much less did it decide against any such authority or the validity of any such statute.

Third Point.

There is no Federal question involved in the third ground assigned as error.

The third ground of alleged error is that Exhibit B, the copy of the receipt which the attorney gave for these moneys, was received in evidence without sufficient certification, and without proof of the authority of the Secretary of the Treasury.

The latter branch of the objection is the same considered under the Second Point. The former branch was merely a question of the construction to be put

upon a statute of the State of New York (Code, § 944).

This question of the construction of the statute of New York is plainly a matter of local law, and so involves no Federal question.

Poppe v. *Langford, ubi supra.*

Fourth Point.

Assuming that this Court should find that a Federal question was raised and decided by the Court below, this Court will not attempt to review that decision, inasmuch as the plaintiff in error makes no claim for himself, but for a third person (the United States), in whose title he has no interest.

The defendant below nowhere claimed any "title, right, privilege or immunity" for himself under any "statute, commission or authority" of the United States to the fund in his hands. He merely sought to escape his obligation implied in law to account to the executors by setting up a claim to the funds made by a third person—the United States. The utmost length of the allegation in the answer was that "on or about June 22, 1885, the Secretary of the Treasury opened the whole question of the award in the Vetterlein case and caused defendant to be notified thereof." Assuming this to be true, it is a claim of no right of the attorney in respect to the funds, but a right of some third person, and is not such a claim as the statute contemplates.

Long v. *Converse*, 91 U. S., 105.

Miller v. *Lancaster Bank*, 106 U. S., 542.

There is, of course, the further objection to reviewing this judgment in respect to the alleged claim under an "authority" of the United States, that the Court below did not undertake to determine upon its validity one way or the other, but merely decided that assuming the authority to exist it was of no consequence to the suit, because the attorney could not set it up. Such a question of "authority" presents no matter for review here.

Millingar v. *Hartupee*, 6 Wall., 258.
Baltimore, &c., R. R. Co. v. *Hopkins*, 130 U. S., 210, 224.

Fifth Point.

This Court has no jurisdiction to review the judgment below by writ of error, and the proceeding should be dismissed, and this Court should impose additional costs as provided by Rule 23.

The record discloses no error committed by the trial Court. The only explanation of this proceeding is the desire of the plaintiff in error to obtain delay—to postpone as long as possible the final accounting for these moneys which he obtained while exercising a function of the highest trust, that of an attorney to clients. The utter bad faith of the attorney in attempting any defense to this action below is apparent on the pleadings themselves. The executors demanded payment of this money from the attorney on June 1, 1885 (fols. 12, 23), and their right of action then accrued. It was not till *twenty-one days later* (fol. 15) that the attorney pretends that he received the convenient notification that the Secretary of the Treasury was reconsidering the award, and there is

no allegation or proof that any demand for the return of the money had ever been received up to the time of the trial, October 13, 1886 (fol. 19). On June first the Vetterlein case had not been reopened; no claim whatever had then been made to this money except by these executors, and the attorney's refusal to pay it to them then was wholly unjustifiable.

The case was properly decided in every view.

The writ of error is frivolous if ever any was. The Court should grant such compensation for this delay as it can under the rule.

Whitney v. *Cook*, 99 U. S., 607.

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